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April 7, 2005

REPORT TO THE COMMITTEE ON
GOVERNMENT EFFICIENCY AND OPENNESS

REVIEW OF CHARTER SECTION 42, MEMBERSHIP SELECTION

INTRODUCTION

San Diego City Charter section 42 addresses the selection of members to serve on City boards, commissions, committees, and panels. In particular, this section requires that the appointing authority, when selecting appointees to such boards and commissions, consider the appointee's sex, race, and geographical area to ensure that the membership reflects the diversity of the community. There are no specific procedures that implement the requirements of this City Charter section. Earlier this year, Councilmember Donna Frye suggested that materials submitted by the Mayor in support of appointments subject to City Council confirmation identify the appointees' area of residence and Council District to assist in complying with the Charter requirement. The Mayor's Office has agreed to provide that information, however, it has been suggested that this procedure be formalized. In that regard, the Office of the City Attorney has been asked to review City Charter section 42 and provide recommendations for implementing the requirements through the San Diego Municipal Code.

DISCUSSION

City Charter section 42, "Membership Selection," states:

The appointing authority in selecting appointees to commissions, boards, committees or panels shall take into consideration sex, race and geographical area so the membership of such commissions, boards, committees or panels shall reflect the entire community.

The above section was added to the City Charter in 1973 with the passage of Proposition K. On February 4, 1974, this office issued a memorandum regarding implementation of the new charter provision.¹ According to the memorandum, the provision was aimed at diminishing discrimination and establishing a broader representative base in appointments to commissions, boards, committees, and panels. The provision requires that the appointing authority "take into consideration" certain factors so that membership in City boards

¹ A copy of the February 4, 1974, memorandum is attached as Attachment "A."

and commission reflect the community. The Mayor is the appointing authority in most instances, and as such, is required to consider the diversity of the board or commission when selecting appointees. The memorandum suggested that, if the Council is concerned that the objectives of City Charter section 42 are not being met, the Council can withhold confirmation.

A few years later, the question arose as to whether the boards and commissions that do not meet the diversity goals are legally constituted. In a memorandum from this Office dated May 12, 1978, this Office opined that the requirement to take certain factors into consideration was "a stated objective" rather than a mandatory requirement.² In that regard, the ballot argument written by the drafters of Proposition K stated that the objective is: "to the end that membership on such City organized citizen groups reflects as broad and varied segment of the entire community as is possible." (emphasis added). As a practical matter, it may not be possible to achieve diversity on all boards and commissions. The appointing authority is required to use his or her best efforts in achieving the diversity goals. The memorandum concluded that there was no information that appointments were made without taking into consideration sex, race, and geographical area, and accordingly the boards and commissions were legally constituted.

Although there is no specific implementing language in City Charter section 42, the Council retains the inherent authority to decline to confirm mayoral appointees that do not, in their opinion, meet the diversity objectives of the City Charter. In addition, the Council has adopted procedures for Mayor and Council appointments. Council Policy 000-13 describes the nomination procedures and restates the requirement that the Council take into consideration the sex, race, and geographical area of its appointees so that the membership of boards and commissions reflect the composition of the entire community. Accordingly, the Council Policy would be a logical place to add any implementing procedures. For example, the Council Policy could be amended to require that the Council be provided with each appointee's area of residence and Council District to assist with the goal that membership in boards and commissions reflect the various geographical areas of the City.

The Council also could adopt implementing language that would be added to the Municipal Code. In that regard, Council Policy 000-01 states: "Regulatory policies established by the City Council usually are adopted by ordinance and included in the Municipal Code. However, other policies also are established which by their nature do not require adoption by ordinance." In this instance, the Council has adopted Council Policy 000-13 to establish procedures for appointments to boards and commissions. Accordingly, an amendment to Council Policy 000-13 would be appropriate and may provide greater flexibility in applying the policy to the various and diverse types of boards, commissions, committees, and panels, some of which have specialized selection criteria. Finally, any proposed implementation procedures would require additional research to determine whether consideration of the race and sex of an appointee is a violation of state or federal laws regarding discrimination or preferences.

² A copy of the May 12, 1978, memorandum is attached as Attachment "B."

CONCLUSION

City Charter section 42 has the objective of providing the City with diverse representation of citizens on its boards, commissions, committees, and panels. The Council has the power to decline to confirm appointments that do not, in its opinion, meet the diversity objectives. If additional implementation language is desired, an amendment to Council Policy 000-13 would be appropriate. However, this office is ready to assist in drafting language to amend either the Council Policy or the Municipal Code to more fully implement the City Charter requirements, as directed by this committee.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Aguirre", with a stylized flourish at the end.

MICHAEL J. AGUIRRE
City Attorney

MJA:CMB:jb
Enclosures
RC-2005-6

February 4, 1974

Councilman Jim Bates

City Attorney

Implementation of Proposition K.

Your memorandum of January 23, 1974, asks this office, in concert with the City Clerk, to establish some guidelines to assist in implementing the provisions of Proposition K (new Section 42). That new Charter section reads as follows:

Section 42. MEMBERSHIP SELECTION.

The appointing authority in selecting appointees to commissions, boards, committees or panels shall take into consideration sex, race and geographical area so that the membership of such commissions, boards, committees or panels shall reflect the entire community. [Emphasis added.]

The ballot argument set forth by the proponents of Proposition K indicated that this language was aimed at diminishing discrimination and establishing a broader representative base in appointments to commissions, boards, committees and panels. To that end it would require the appointing authority to take such factors as sex, race and residence into account when selecting appointees. The language, however, does not mandate any specific action be taken at any given time.

As our office opined orally to the Council, attainment of a balanced panel may, in some instances, be impossible. This situation can occur when the membership of the group is too few in number to achieve balance or special expertise is indicated at its inception. On other occasions, the appointing authority can only be expected to use his best efforts in achieving a balance so far as is practicable and possible.

The Mayor, as appointing authority in most instances, is responsible for appointing persons to various commissions, boards and committees. I have been assured that the Mayor's efforts in this endeavor have included considerations of those factors set forth in Proposition K. Council Policy No. 000-13 provides additional assurances that the Council receives

Councilman Jim Bates

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February 4, 1974

advance notification of prospective appointments so that sufficient time may be devoted to consideration of said prospective appointees. The Charter vests with the Council the power of confirmation of such appointments. Should the Council in its collective judgment conclude that the intent of Proposition K is not being properly achieved, its remedy lies in its power to withhold confirmation.

JOHN W. WITT, City Attorney

By /s

Jack Katz, Chief Deputy

JK:K

cc Mayor
City Council
City Clerk

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JOHN W. WITT
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: May 12, 1978
TO: Members, Rules Committee
FROM: City Attorney
SUBJECT: Requirements of Charter Section 42

By memorandum of Councilman Jess Haro and in discussions at Rules Committee meetings, questions have been raised concerning Charter Section 42 which requires the appointing authority to take into consideration sex, race and geographical area so that the membership of commissions, boards, committees and panels shall reflect the entire community. The specific issue is whether the provisions of Section 42 are mandatory and if so are commissions, boards, committees and panels not meeting this requirement legally constituted.

It is our opinion that the only mandatory provisions of Section 42 is that the appointing authority take into consideration sex, race and geographical area. The objective of such consideration is so that the membership of such commissions, boards, committees and panels shall reflect the entire community. It is our opinion that present commissions, boards, committees and panels are legally constituted. Our analysis follows.

Section 42 of the Charter of The City of San Diego reads as follows:

Section 42. MEMBERSHIP SELECTION.

The appointing authority in selecting appointees to commissions, boards, committees or panels shall take into consideration sex, race and geographical area so that the membership of such commissions, boards, committees or panels shall reflect the entire community.

This section was added to the Charter upon the recommendation of the San Diego Charter Revision Committee 1973. This change

ATTACHMENT "B"

Members, Rules Committee

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May 12, 1978

appeared on the ballot as Proposition K at the General Municipal Election held November 6, 1973 and it was approved by the voters and became effective December 7, 1973. The argument filed in favor of Proposition K was signed by Edward T. Butler, Chairman, and John C. Leppert, Vice Chairman of San Diego Charter Revision Committee 1973. The applicable part of the argument read as follows:

The proposal includes another requirement aimed at diminishing discrimination and establishing a broader representative base in the appointment of persons to city commissions, boards, committees and panels. The appointing authority would be required to take into account such factors as race, sex and residence of appointees to the end that membership on such city organized citizen groups reflects as broad and varied segment of the entire community as is possible. [Emphasis added.]

Only by providing a method for airing the widest views and divergent opinions in our community, can these citizen oriented commissions, boards, committees and panels effectively perform their advisory functions, which have been so important to City officials over the years.

A reading of this argument written by the drafters of the change indicates that the appointing authority would be required to take into account such factors as race, sex and residence of appointees. This is clearly a mandatory provision. The argument goes on to say that the objective is "to the end that membership on such City organized citizen groups reflects as broad and varied segment of the entire community as is possible." There is nothing contained in the argument which would lead one to conclude that the drafters of the section intended anything more than a guide to be followed by an appointing authority in reaching the desired objective of broad representation on commissions, boards, committees and panels.

On February 4, 1974, Chief Deputy City Attorney Jack Katz in a memorandum to Councilman Jim Bates discussed Proposition K and concluded that its provisions were not mandatory and suggested that if the Council felt the intent of Proposition K was not being properly achieved that its remedy lies in its power to withhold confirmation. A copy of that memorandum is attached for your information.

Members, Rules Committee

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May 12, 1978

Inasmuch as we believe that the statement in Charter Section 42 that membership of commissions, boards, committees and panels shall reflect the entire community is to be construed as a stated objective and not a mandatory requirement, it is our opinion that all City commissions, boards, committees and panels are legally constituted. We have no information to indicate that appointments made since Section 42 was added to the Charter have been made without taking into consideration sex, race and geographical area. We believe that the Mayor and Council, in making appointments to commissions, boards, committees and panels since Charter Section 42 was added, have complied with the Charter.

JOHN W. WITT, City Attorney

By Stuart H. Swett
Stuart H. Swett
Chief Deputy City Attorney

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